

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

CATHERINE MCKOY, MARKUS FRAZIER, and
LYNN CHADWICK, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

THE TRUMP CORPORATION, DONALD J. TRUMP,
in his personal capacity, DONALD TRUMP, JR., ERIC
TRUMP, and IVANKA TRUMP,

Defendants.

No. 1:18-cv-09936-LGS-SLC

**DECLARATION OF MATTHEW D. BRINCKERHOFF IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

MATTHEW D. BRINCKERHOFF, declares under penalty of perjury pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. My name is Matthew D. Brinckerhoff. I am a partner in the firm of Emery Celli Brinckerhoff Abady Ward & Maazel LLP, counsel for Plaintiffs Catherine McKoy, Markus Frazier, and Lynn Chadwick ("Plaintiffs"). I submit this declaration in support of Plaintiffs' Motion for Class Certification.

2. Annexed as **Exhibit 1** is a true and accurate copy of excerpts from the transcript of the August 18, 2022 deposition of David Merriman, who testified on behalf of non-party ACN Opportunity, LLC ("ACN") as its designee pursuant to Fed. R. Civ. P. 30(b)(6).

3. Annexed as **Exhibit 2** is a true and accurate copy of a spreadsheet documenting ACN Independent Business Owner ("IBO") sign-ups from 2012 to 2016.

4. Annexed as **Exhibit 3** is a true and accurate copy of excerpts of the November 18, 2022 Expert Report of Michael Gartenberg.

5. Annexed as **Exhibit 4** [reserved].
6. Annexed as **Exhibit 5** is a true and accurate copy of a February 6, 2006 Trump Organization memorandum from Cathy Glosser enclosing the February 6, 2006 Endorsement Agreement between Donald Trump and ACN.
7. Annexed as **Exhibit 6** is a true and accurate copy of a February 15, 2006 email from Robert Stevanovski at ACN.
8. Annexed as **Exhibit 7** is a true and accurate copy of the February 2008 Endorsement Agreement between Donald Trump and ACN.
9. Annexed as **Exhibit 8** is a true and accurate copy of the January 28, 2009 Appearance and Endorsement Agreement between Donald Trump and ACN.
10. Annexed as **Exhibit 9** is a true and accurate copy of the January 14, 2011 Appearance and Endorsement Agreement between Donald Trump and ACN.
11. Annexed as **Exhibit 10** is a true and accurate copy of the February 13, 2013 Appearance Agreement between Donald Trump and ACN.
12. Annexed as **Exhibit 11** is a true and accurate copy of an October 30, 2015 email from Rhona Graff at The Trump Organization attaching the Mutual Termination of Appearance Agreement executed by Donald Trump and ACN on June 20, 2015.
13. Annexed as **Exhibit 12** is a true and accurate copy of a November 17, 2008 email from Sheila Marcello at ACN attaching an ACN document titled, “24 HOUR GAME PLAN.”
14. Annexed as **Exhibit 13** is a true and accurate copy of excerpts of the November 18, 2022 Expert Report of Stacie Bosley.

15. Annexed as **Exhibit 14** is a true and accurate copy of a December 11, 2012 email from Sheila Marcello at ACN and accompanying attachments, including ACN documents titled: “Road Map to LEXUS,” “IBO Getting Started Process,” and “Presenting the Opportunity.”

16. Annexed as **Exhibit 15** is a true and accurate copy of ACN Opportunity Disc, Version 4.0, June 2010.

17. Annexed as **Exhibit 16** is a true and accurate copy of excerpts of the August 2011 issue of *Success from Home* magazine.

18. Annexed as **Exhibit 17** is a true and accurate copy of ACN Opportunity Disc Version 5.3, December 2011.

19. Annexed as **Exhibit 18** is a true and accurate copy of ACN Opportunity Disc Version 5.5, May 2012.

20. Annexed as **Exhibit 19** is a true and accurate copy of ACN Opportunity Disc Version 5.6, June 2012.

21. Annexed as **Exhibit 20** is a true and accurate copy of ACN Opportunity Disc Version 6.1, September 2012.

22. Annexed as **Exhibit 21** is a true and accurate copy of ACN Opportunity Disc Version 7.0, January 2013.

23. Annexed as **Exhibit 22** is a true and accurate copy of ACN Opportunity Disc Version 9.2, June 2015.

24. Annexed as **Exhibit 23** is a true and accurate copy of excerpts of the November 18, 2022 Expert Report of Kevin Lane Keller.

25. Annexed as **Exhibit 24** is a true and accurate copy of an ACN promotional video featuring Donald Trump.


26. Annexed as **Exhibit 25** is [reserved].
27. Annexed as **Exhibit 26** is a true and accurate copy of an ACN promotional video featuring Donald Trump.
28. Annexed as **Exhibit 27** is a true and accurate copy of excerpts from the transcript of the October 11, 2022 deposition of Donald J. Trump.
29. Annexed as **Exhibit 28** is a true and accurate copy of ACN's 2012 Policies and Procedures.
30. Annexed as **Exhibit 29** is a true and accurate copy of an October 25, 2006 email from Robert Stevanovski at ACN.
31. Annexed as **Exhibit 30** is a true and accurate copy of excerpts of the September 2014 issue of *Success from Home* magazine.
32. Annexed as **Exhibit 31** is a true and accurate copy of excerpts of the August/September 2008 issue of *Success* magazine.
33. Annexed as **Exhibit 32** is a true and accurate copy of excerpts of the August 2010 issue of *Success from Home* magazine.
34. Annexed as **Exhibit 33** is a true and accurate copy of an internal ACN financial analysis titled "ACN Consolidated Summary."
35. Annexed as **Exhibit 34** is a true and accurate copy of a March 26, 2010 letter from Brian L. Davis of McColl Partners to ACN Chairman Robert Stevanovski enclosing a document titled "Confidential Information Memorandum," and excerpts of the same memorandum.
36. Annexed as **Exhibit 35** is a true and accurate copy of excerpts from the transcript of the August 23, 2022 deposition of Anne Archer Butcher.

37. Annexed as **Exhibit 36** is a true and accurate copy of the March 2009 episode of *The Celebrity Apprentice* featuring ACN.

38. Annexed as **Exhibit 37** is a true and accurate copy of the March 2011 episode of *The Celebrity Apprentice* featuring ACN

39. Documents produced by non-party ACN in this case include lengthy spreadsheets listing thousands of ACN Independent Business Owners (“IBOs”) at particular points in time and their ACN earnings, if any. One such spreadsheet is over 700 pages long and lists 65,535 IBOs and “raw data” detailing their earnings, if any. Given the length of the spreadsheet, it is not attached as an exhibit here. Plaintiffs can supplement the record and provide a copy of the complete spreadsheet containing the raw IBO enrollment data to the Court, if needed.

Dated: March 10, 2023



MATTHEW D. BRINCKERHOFF

EXHIBIT 1

David Merriman

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

CATHERINE MCKOY, MILLARD

WILLIAMS, MARKUS FRAZIER, and

LYNN CHADWICK individually and

on behalf of all others

similarly situated,

Index No.

1:18-cv-09936-LGS

Plaintiff

Vs.

THE TRUMP CORPORATION, DONALD J.

TRUMP, in his personal capacity,

DONALD TRUMP JR., ERIC TRUMP,

and IVANKA TRUMP,

Defendants.

Videotape Deposition of

David Merriman

Thursday August 18, 2022

At 9:48 a.m.

Reported by LeShaunda Cass-Byrd, CSR, RPR

JOB NO. 215262

David Merriman

3.

I just want to ask you a couple of questions about some key terms in this agreement.

First, on the first page about maybe two-thirds of the way down the page, you can see a box under the heading "Acceptance and Payment." And that indicates that the initial fee a person must pay ACN in order to sign this agreement and become an IBO is \$499; is that right?

A. Yes.

Q. To your understanding, from the period 2012 to 2016, was that the standard IBO enrollment fee?

A. Yes.

Q. If you turn to the second page, and apologies, the font gets a little small, but if you kind of squint at page 3, I think this reflects some testimony you gave earlier, beginning on the third line there's a sentence that says, "I acknowledge that my IBO relationship is with ACN Opportunity, LLC, and not with any ACN provider."

Do you see that?

A. Yes.

Q. And is that your understanding that throughout that period, again, let's say 2012 to 2016,

David Merriman

purchase themselves or market and sell as they pursue the business opportunity?

A. Yes.

Q. Paragraph 2, just above that, references a compensation plan, and refers to commissions, bonuses, or other compensation earned through the ACN compensation plan.

Do you see that?

A. Yes.

Q. And we will come back to this, too. But at a high level, is that -- are those, basically, the ways in ACN and IBO can earn payments from ACN?

A. Yes. Commission or bonuses, and there are other types of compensation as well.

Q. Great. Okay. We'll go through commissions and bonuses and the others in just a minute.

If you look down at paragraph 7, this speaks to the term of the agreement and the possibility of extension.

Do you see that?

A. Yes.

Q. Around the 4th or 5th line there, refers to payment of an annual renewal fee in order to extend. So the agreement -- let me back up. The agreement is

1 David Merriman

2 for an initial term of one year, right?

3 A. Correct.

4 Q. And it can be extended with payment of
5 a renewal fee?

6 A. And agreeing to the terms and the
7 conditions as of the renewal date.

8 Q. Okay. And it specifically here doesn't
9 give an amount for the renewal fee. It says payment
10 of ACN's annual renewal fee sort of according to the
11 terms and conditions, right?

12 A. Yes.

13 Q. If you go back to the first page, the third
14 box down says "U.S. Terms and Conditions," right, and
15 begins a series of numbered paragraphs stating terms
16 and conditions, right?

17 A. Yes.

18 Q. And, in fact, at the bottom of that section
19 on the first page it says, "Please see page 2 for
20 additional terms and conditions," right?

21 A. Yes.

22 Q. So these that we are looking at here, these
23 numbered paragraphs, these are the terms and
24 conditions; is that right?

25 A. That is correct.

1 David Merriman

2 A. Yes. Different plans, yes.

3 Q. Okay. And if you flip -- flip to the next
4 page, kind of in the middle of the page, you can see,
5 again, the AT&T U-verse DSL, right?

6 A. Uh-huh. Yes.

7 Q. But slightly different services. Here,
8 it's TV only, or different versions of a TV and
9 internet plan; is that right?

10 A. That's right.

11 Q. So that's what you're describing, right,
12 some services are classified as preferred, and others
13 are classified nonpreferred?

14 A. That is correct.

15 Q. Okay. Let's -- let's go back to that first
16 page ending in Bates number 018, and stay with the
17 qualification process for a minute.

18 ACN IBOs can be customers themselves,
19 right, they can just enroll in certain services?

20 A. They can, yes.

21 Q. And they can enroll family members or
22 people in their household?

23 A. Sure. Yes.

24 Q. And so one way to earn customer points is
25 no just enroll in services oneself, or for members of

David Merriman

one's household?

A. Yes.

Q. But as we see here, in order to qualify as a qualified team trainer, and ultimately to reach other levels as well, some of the points must be coming from outside of the household, right?

A. That's correct.

Q. Okay. Above the levels of TT and QTT, there are six more levels, right?

A. Yes.

Q. And they're -- they're referred to as earned positions?

A. Correct.

Q. And to qualify for any of those, an IBO must recruit new team trainers, right?

A. They -- they have to have customers in order to qualify. Each of those people, so... Recruiting somebody won't get you qualified.

Q. Understanding that there may be customer requirements, too, in order to reach, let's say, the next -- the first earned position, executive team trainer, you must -- and we can see this in the diagram -- you must also, in addition to accumulating customer points, recruit team trainers who then

1 David Merriman

2 Q. Yes.

3 A. Yes. Yes.

4 Q. Okay. All right. Let's go back to page 2.

5 I want to ask some more detailed questions about a
6 couple of the services.

7 Let me ask you, first, a general question:
8 Were these services offered by ACN itself or by
9 separate companies that ACN contracted with?

10 A. I'm not sure what you mean "offered by."

11 Q. Well, let's take -- I mean, Verizon
12 Wireless is listed here, right? Someone can enroll in
13 a Verizon Wireless plan as -- through an ACN IBO?

14 A. Right.

15 Q. And so ACN has a contract in place then
16 with Verizon where if somebody comes into Verizon
17 through this channel, ACN gets some benefit, pursuant
18 to its contract with Verizon, right?

19 A. That is correct. Yes.

20 Q. And is that basic structure true for all of
21 these services, or was there variation in how that
22 structure worked?

23 A. Well, that was similar, except for the ones
24 you see where there's ACN services. So Flash
25 Wireless, for example -- and the S means Sprint, and

David Merriman

the V means Verizon.

In that case, ACN was, they were signing up through Flash Wireless services, so...

And going back to 2013, I'm not exactly -- I don't exactly remember the sign off process, but I'll use today, for example, and I think it was the same, which is the IBOs can go through what we call their store front, their personal website. They can direct a customer then to choose the service, that customer then gets redirected to a page that shows the different plans that are available, and then the customer can enroll in that way. The IBO gets credit for that enrollment based on -- based on all of that. They can either do that -- because going through their website, or they can put the IBO's ID number in there. That's how the IBO gets credit for that service.

Q. But Flash Wireless is a -- I mean, ACN itself doesn't put up the antennas or own the satellites and actually provide the infrastructure for that wireless service, right?

A. Correct. Correct. So that's why you got -- the S was Sprint, so those are customers around the Sprint network, but the service is being provided. No different than you see with companies like Cricket

David Merriman

and TracFone, and the one offered through Wal-Mart services. Those types of services. Yeah.

Q. Okay. And what was the nature of ACN's relationship with Flash Wireless? Was that a contractual relationship, or a more formal affiliation?

A. Oh, Flash Wireless was a subsidiary of ACN.

Q. Okay.

A. Okay. And that company contracted with Verizon.

Q. Got it.

So ACN owned Flash Wireless?

A. Correct.

Q. Got it.

Just starting at the top there's a reference to digital phone service.

A. Yes.

Q. And it -- the first -- the first line there says "residential digital phone service." You know, again, did -- did -- ACN itself didn't provide the technical infrastructure to support that digital phone service, right?

A. Well, actually, we did. So we had our own VoIP network.

David Merriman

there was, sort of, a blast e-mail account that ACN use to communicate with IBO, sometimes posting advisories or additional requirements, right?

A. Yes.

Q. Is that also a way that the documents might get incorporated into the overall agreement between an IBO and ACN Opportunity, LLC?

A. Yeah, if a change was made to the policies or we felt like something needed to be kind of reinforced, we would send out what's called ACN action document to all active IBOs.

Q. By e-mail?

A. By e-mail, yes.

Q. Okay. So let's focus on this marketing and advertising policy for a minute. Let me ask you to turn to the first page of it, the first page after the cover which bears the Bates number ACN 000583. The first section there is called "General Marketing and Advertising Policy."

Do you see that?

A. Yes.

Q. And it just want to read the first paragraph, and then I'm going to ask you a couple of questions about it. That paragraph says, "ACN has

David Merriman

developed a SUCCESS system, based on solid experience and knowledge. As such, we have created marketing materials, business tools, and activities to fully support this model. No other marketing materials or activities are necessary to become successful as ACN independent representative.

Therefore, ACN strongly discourages our independent representatives from creating and/or distributing any marketing materials. Marketing materials for the purpose of this policy is not limited to printed material, but also includes website and online content, appearances and media representation."

Do you see that?

A. Yes.

Q. Understanding, again, that there may be changes to verbiage overtime, is the substance of that policy, was that consistent from 2012 to 2016?

A. I believe it was.

Q. And, you know, to make sure I understand it, ACN created it's own marketing materials that it encouraged IBOs to use and strongly discouraged IBOs from creating or using their own marketing materials, right?

David Merriman

A. That is correct. You need to make sure that they are accurate and legal disclaimers, and that sort of things.

Q. Right. And consistent across IBOs?

A. Correct. Correct.

Q. And as a practical matter, is it your understanding that as a matter of practice, IBOs overwhelmingly did use ACN's marketing materials?

A. I believe it did, yes.

Q. If you look at Section 3, the heading refers to Cold Marketing. And it -- the paragraph, and I will read a portion of the paragraph, says, "ACN is a network marketing company that is focussed solely on relationship or, quote, unquote, warm marketing techniques. ACN strictly prohibits independent representatives from engaging in any, quote, unquote, cold marketing techniques for purposes of customer acquisition at any time.

Code marketing is defined as any promotional activity that is geared toward random individuals who have no personal business, social or acquaintance relationship with the promoter."

Do you see that?

A. Yes.

David Merriman

Q. And then insofar as they were successful at those meetings and or in follow-up, you know, gatherings like we've talked about, in recruiting people as IBOs, those IBOs then, among themselves, might also have training sessions or other sorts of meetings, and at those as well, ACN created materials were -- were what was used, as opposed to IBO created materials?

A. Correct. Yeah. Now, some of those could be just reused, right, so they use them in one meeting and use them the next. Some of it was online, so they could just bring up -- you know, they could bring up a website on their TV screen and that sort of thing. That's usually what they did.

Q. Okay. And there was also something, a physical item called the Opportunity Disc, right?

A. Yes.

Q. And that was a significant source of these materials, or instance of these promotional materials created by ACN?

A. It was one of the materials that IBOs could use. Yes.

Q. And it was -- it was a CD, or a disk of some kind, maybe a DVD, but a disk that IBOs could use

David Merriman

at these private business receptions or other similar events, right?

A. They could. Yes.

Q. And it was sold by ACN to IBOs, right?

A. That is correct. Yeah.

Q. And there were -- were there other -- were there print materials, as well, brochures, fliers?

A. There were some. I mean, some of them they got when they first signed up, and then there is other information that they can either download and print themselves, or they could purchase it. But, you know, most of it -- most of it was online, especially in this time frame.

Early -- in the early days, it was more printed and videos and that sort of thing. As, you know, you get into the more recent times, it was -- everything was pretty much online for people to be able to download or -- to either print, or just show on -- to show to other people.

Q. And that -- all of that material -- well, let me just tease apart two different kinds of online content.

IBOs, once enrolled, had access to ACN websites, right, where they could pull down, or

David Merriman

A. Well, that was more content that just talked about what was going on in the ACN. So there was maybe articles about a new plan that maybe one of the company -- carriers was offering. We may have -- and there was a lot of recognition, so we would have recognition for people that earned certain levels and that sort of thing. That was in the news magazine.

Q. Got it.

A. And, you know, if we were talking about international expansion, that may have been referenced in the news magazine, as well, in terms of which country we are going to launch and what services we offered in -- in those countries.

Q. Is it fair to say then that that magazine primarily was for keeping current IBOs informed and maybe excited and -- and growing their business, but it was directed at the current IBOs for those purpose?

A. That's correct. Yeah.

Q. As opposed to promotional materials available to IBOs for their use in attracting new IBOs or new customers?

A. Correct. Yes.

Q. The materials in that later category would include the opportunity disc, and maybe some of these

David Merriman

other print or video materials created by ACN?

A. Correct.

Q. Okay. I want to touch on SUCCESS magazine and Success from Home magazine.

Are you familiar with those publications?

A. Yes, I am.

Q. Can you just generally describe for us what they are and how they relate to ACN?

A. Well, SUCCESS magazine has been around for decades, and that is more of personal development magazine. It doesn't have anything to do with direct selling, network marketing. It's more just general business and entre -- more entrepreneurship, I guess I would say, or that personal development side of business. Completely separate magazine.

And then there is also -- there is also Success from Home, which was geared more towards the direct selling business, but also adds some personal development in that as well. Both of those were available at newsstand, such as Barnes & Noble, those sort of places.

Q. All right. I want to talk more in detail, but let me mark the next document.

(Plaintiff Exhibit 10 was marked for

David Merriman

in this e-mail she writes that -- kind of look at the second line, maybe half way over, she refers to Success from Home magazine as, quote, more inhouse than news stand use, as this is a promotional arm of SUCCESS magazine that the network marketing companies use to highlight their companies if invited by SUCCESS magazine.

Do you see that?

A. I see what is written here, yes.

Q. Is that a fair description, in your view, of what Success from Home magazine was?

A. I don't know how many of the magazines, for example, were distributed through news stands versus what were distributed, you know, through the companies themselves. So I can't really comment on that.

Q. So let me break that down a little bit.

The Success from Home magazine, as you said, was distributed both through news stands, like Barnes & Noble, but also by network marketing companies who were featured in it, right?

A. And I believe there were also other people in the industry that would just get a subscription to it. So they -- yeah, they definitely -- because I got a subscription to it, so I would get a copy of that

David Merriman

month's Success from Home. Every month it would come --

Q. Got it.

A. -- regardless as to which company was featured.

Q. So three channels of distribution, as you understand it then, news stand, subscription, and kind of bulk purchase and resell by network marketing companies themselves?

A. That's what I'm aware of. Yes.

Q. Okay. Does ACN itself have -- or did it ever have a -- any kind of ownership interest in the SUCCESS entities?

A. No. Not to my knowledge.

Q. So insofar as ACN had a relationship with SUCCESS, it was a just contractual relationship for bulk purchase and resell of these magazines?

A. They were a vendor of ours for the magazines and some other things, too.

Q. Okay. There is an entity called SUCCESS Partners. Do you understand that to be the kind of umbrella entity behind the various SUCCESS publications and other things that you've referenced?

A. Yes. And it -- it originally was Video

David Merriman

Video Plus was sort of a brand that R&L Publishing was using, right?

A. Correct. Yes.

Q. Okay. So this is contract then between ACN and the publisher of Success from Home magazine at this time in March of 2011?

A. Yes.

Q. And if you turn to page 2, there is a numbered list and the publisher agrees to produce a 132-page magazine with various features and profiles and photo shoots all featuring or highlighting ACN, right?

A. Yes. It says that. Yes.

Q. And in exchange, if you go back to page 1, ACN agree to purchase 200,000 copies of that magazine, and potentially more, at a price of 300 per copy, right? Or \$3, excuse me, per copy.

A. Correct.

Q. And again, I mean, this is just an example. That was the basic framework, as you understood it, for any ACN feature and Success from Home magazine, right? This is the basic way that that exchange worked?

A. At a very high level, yes.

David Merriman

Q. Okay. And the -- you can put that to the side.

A. Okay.

Q. The business model that is -- that ACN turns around and sells smaller bundles of Success from Home magazine to its IBOs, right?

A. Correct.

Q. And actually, apologies, I told you you could put that to the side, one more thing.

On page 2, in the third paragraph, that is actually memorialized in this agreement, right? It says, "The company may sell magazines in bundles of 10 or more. Single copies of the magazine may not be sold," right?

A. I am sorry. Where are you seeing that?

Q. It's sort of the third paragraph, about halfway down to page 2.

A. Yes. I see it.

Q. Okay. And that was consistent with ACN's actual practice, right? It sold Success from Home magazine in bundles to its IBOs, right?

A. Yes.

Q. And why is that? Was that -- was the idea that the IBOs would use that -- copies of the magazine

David Merriman

to kind of pique interest of perspective IBOs or customers?

A. Well, they could. But I believe the reason for the 10 -- packs of 10 is so that the -- so we didn't have any conflict with Barnes & Noble -- Barnes & Noble, Borders, Books-A-Million, so there is certain rules in the publishing trade in terms of, you know, certain agreements that they have. So that was -- must be why there is a requirement to have a bundle of ten or more.

Q. Got it.

The magazines were kind of designed though so that IBOs could use to -- to pique interest, right, and they were encouraged to do that?

A. Yes. They were -- no requirement, but some people did. Some people used it.

Q. Okay.

(Plaintiff Exhibit 12 was marked for identification.)

BY MR. QUINN:

Q. So now we have handed you a copy of what we marked as Exhibit 12. This is an e-mail and attachment produced to us by ACN with the Bates number ACN004835, and this is an e-mail about an auto

David Merriman

And we will come to that in a minute.

That structure was the same, right, that was a tool available for purchase from ACN by IBOs?

A. Yes.

Q. And at some point, ACN kind of faded out the physical opportunity disc, but took that same ACN-created consistent content and just made it available online rather than through the physical CD or DVD?

A. Correct. Again, it was a matter of giving IBO a tool to be able to use.

Q. Okay. And still that was a tool that contained set of promotional materials and a tool for which IBO was paying ACN?

A. Which --

Q. In other words, the ACN, once the opportunity disc content moved to an online medium, IBO still had to pay ACN to access it?

A. No. Most of that was available to them. Just by being in IBO, they can log in. Difference is, that way we could post it on there, there was no cost to ACN, so therefore, you know, they could access it, you know, just by going by logging in as an IBO. It wasn't on the public side. It was on what we call the

David Merriman

A. Sure.

Q. That was -- that was designed or the purpose of that was for the IBO's own development, right?

A. Yes.

Q. For their personal use?

A. Success On Demand was marketed to many, many different people, not just indirect -- so it would have been something similar to SUCCESS magazine, which wasn't a direct selling publication, but more of a general business personal development.

Q. Got it. So then if we look at number 2, that is where we get to piquing tools.

Do you see that, P-I-Q-U-I-N-G, piquing?

A. Yes.

Q. It's a term I've used a couple of times today. I don't know if you've noticed?

A. Okay.

Q. That's a term that we've seen is in a number of ACN documents. Can you just tell us what ACN means in that term?

A. Well, that's -- it's a tool for an IBO to use to talk to somebody else about potentially being an IBO. So it's -- the reason why I call it a piquing

David Merriman

tool is, it sometimes people that just get involved in a business like this, and if they want to talk to people, they need something to help them, right? What is that -- what's the kind of icebreaker, right? What do I say? What should I do? So these are tools that they could use to walk people through what the businesses is all about.

Q. Got it. And the tools referenced here, specifically, are the Success from Home magazine and opportunity discs?

A. Yes. And called piquing, because it's really to pique their interest to see if they are interested at all.

Q. Got it. And as we have seen, I mean, dating back to 2006, those are the same two tools that ACN is making available to IBOs for this purpose, right, Success from Home magazines and opportunity disc?

A. Yes. Again, I don't remember when they started an ended.

Q. Okay. But they started it at least as early as 2006 and continued at least to mid-2014, correct?

A. Right.

David Merriman

Q. And then at some point, the opportunity disc portion was moved online, but the substantial content of it was basically the same, just presented through a non-physical medium?

A. Correct.

Q. Okay. If you turn one more page to the page that ends in 917, there is a reference to a Cleveland International Training Event.

Do you see that?

A. Yes.

Q. And these training events, these were held regularly by ACN, right, throughout the period we have been discussing?

A. Yes.

Q. And IBO is paid to attend those as well, right?

A. Yes.

Q. We can look at a document on this, but can you give us an estimate of what the cost is for an IBO to attend an international training even like this?

A. It was for a full weekend, like mid -- or like Friday afternoon through Sunday afternoon. And it was about -- depending on, you know, preregistration pricing and at-the-door pricing, it

1 David Merriman

2 was generally around \$129 to \$189.

3 Q. Okay. Yeah, we've seen one from 2013 that
4 referenced a preregistration price of 160 dollars and,
5 you know, a day-of price of 190 dollars.

6 That sound about representative to you?

7 A. That could be, yes.

8 Q. Okay. Were these events open only to
9 current IBOs or perspective IBOs invited to attend?
10 What was the attendance?

11 A. They were primarily, like the vast, vast
12 majority, probably 90 percent, if not higher for IBOs
13 because they were training events. Now, if somebody
14 was from the area, like originally from Cleveland, if
15 I was an IBO -- or if I was an IBO and I knew
16 something in Cleveland, I would want them to stop by
17 and check it out. You know, they could attend as
18 well.

19 Q. Okay. There was no prohibition or barrier
20 on that?

21 A. No, because we offered guests to register.
22 They could register a guest if they wanted to.

23 Q. I see. So an IBO can bring a guest?

24 A. Now, sometimes a guest maybe their spouse,
25 you know, maybe their business partner, you know, that

David Merriman

BY MR. QUINN:

Q. I guess just while we are pulling up the Excel spreadsheet, Mr. Merriman, we've handed you as Exhibit 16, an e-mail bearing the Bates number ACN013646, which is an e-mail chain from February of 2010, also referring to and attaching a monthly top 300 earners report, right?

A. That is what it says, yes.

Q. And is that consistent with your memory and knowledge from your preparation for today's deposition that, you know, at least up through 2010, ACN was still creating these top 300 earner reports every month?

A. Yes.

Q. All right. So now we've put up on the screen the attachment, which we'll mark as 16A, and we'll -- this one is even larger, but we'll hand some copies out in the room. Catherine is going to walk around with this one.

But let me ask you -- all right. Just looking through this, again, Mr. Merriman, this is the same format that we have seen, right? A series of tabs, top earners ranked by total compensation, country codes, IBOs name and ID, right? This is the

David Merriman

same format as the document that we looked at last?

A. Yeah. The same format as the previous one.

Q. Okay. And again, let's go to the reps by earnings tab.

Here, again, we see the same sort of summary information providing total numbers of IBOs in a series of earning bands, right?

A. Yes.

Q. And here the numbers are significantly higher, this is January 2010. I'll, again, represent to you we just did the arithmetic and the total number of IBOs here is 65,535.

Do you see that?

A. Yes.

Q. And let's look at the -- the tab that says "Top earner, raw data, January 2010."

Here we can actually see -- and this is why it's so large -- a massive printout of all 65,000 -- it's 65,535 rows of data, right? Just scrolling through the screen.

A. Okay.

Q. You can scroll down to the bottom.

A. Okay.

Q. Okay. Do you see here there are a

David Merriman

that bottom band in November 2011, down to just 4,900 in December of 2011 in the 25 to 100 band, right?

A. That is what it says, yes.

Q. Does this -- focusing on the time period before the change then, before December of 2011, does this seem to you, consistent with the tabs we looked at in the 2010 spreadsheet indicating that that band -- the lowest band, zero to 100, does include IBOs making zero dollars?

A. I don't think it did in the past. I don't think that -- that 60,000 was -- was complete. And this 300,000 may have included inactive IBOs. I don't know. I don't know for sure either way.

Q. Well, let me breakdown a few piece of that. When you say "inactive IBO," what do you mean by that?

A. People that are no longer -- their IBOs are no longer active today.

Q. Does that mean the termination of their IBO agreement has passed, they have not renewed, and they are no longer are an IBO?

A. That's what an inactive IBO would be, yes. They are terminated for the cancelled, they are terminated. He's terminated for compliance reasons.

1 David Merriman

2 on his role as director of marketing?

3 A. That is correct.

4 Q. Okay. All right. Let's look at the first
5 contract.

6 A. Okay.

7 (Plaintiff Exhibit 21 was marked for
8 identification.)

9 BY MR. QUINN:

10 Q. Okay. So Exhibit 21 that we've handed you
11 is a document produced to us by The Trump
12 Organization, with the Bates numbers TT0000616. As
13 you can see, it's an internal Trump Organization
14 memorandum, but the memorandum contains, on the second
15 page, a one-page endorsement agreement between Donald
16 Trump and ACN, Inc., right?

17 A. Yes.

18 Q. And that's an executed agreement, right,
19 signed by both Donald Trump and Robert Stevanovski?

20 A. That's what it says, correct.

21 Q. Okay. As ACN's corporate representative,
22 can you testify that this was -- this is an
23 endorsed -- I mean, this is an actual contract, it was
24 executed and is binding on these parties?

25 A. Yes. This was an executed contract.

David Merriman

Q. Okay. You can see that the title of the contract is entitled, "Endorsement Agreement," right?

A. That is what it says. Yeah.

Q. And per paragraph 1, "ACN agrees to pay" -- maybe four lines down -- "agrees to pay Mr. Trump \$1 million to record a video," right? To record video content.

A. Yes.

Q. And in paragraph 5, "ACN also agrees to pay Mr. Trump a million dollars to speak at a total of three ACN live events, right?

A. That is correct.

Q. You can see in the third line there's a reference to ACN's international events, right?

A. Yes.

Q. And as you said a moment ago, we looked at some documents about those kinds of events earlier, and I just want to clarify, an international event doesn't mean it actually took place outside the United States, right? Many of them took place domestically in the U.S.?

A. Yes. They -- these probably all occurred in the U.S.

Q. Although, you --

David Merriman

A. But they were inviting -- they were open to all IBOs if they chose to -- to come.

Q. Got it.

And that was the name we saw in like the Detroit flier, for example, or some of the other documents, right, international event?

A. Yes.

Q. Okay. In paragraph 6, you can see that Mr. Trump grants ACN a royalty free license to use the video, as well as recordings of the speeches, but solely for purposes of promoting ACN to current or perspective IBOs; is that right?

A. Yes. That is what it says.

Q. And ACN did, in fact, use that content in the opportunity disc and another ACN created promotional materials we've talked about this morning?

A. Yes.

Q. Okay. You can put that to the side for a moment. I would ask you, this is one of those I will ask you to keep handy, because we may look back at it.

A. Okay.

(Plaintiff Exhibit 22 was marked for identification.)

MR. QUINN: Give us just a moment.

David Merriman

A. I'm not aware of anything to the contrary.

BY MR. QUINN:

Q. Okay. So trying to put these pieces together, then, looking at Exhibits 25 and 26, and even 24, again, it's indicating that in the same series of a few days in February of 2006, Mr. Trump films the video content in his office in New York with some of the ACN founders present. And there's also, at the same time, an event in Fort Worth, Texas, at which the Trump endorsement is announced but Mr. Trump doesn't appear personally.

Is that your best understanding?

A. Yes. Mr. Trump did not appear at the Fort Worth convention. And I see the other documentation, they are all about the same. Like you said, based on the e-mails, it's approximately the same time.

Q. Right. Okay. And so in the first line of Exhibit 25, when Mr. Stevanovski says "It went great. He said some perfect things that we can use for our reps."

Do you see that?

A. Yes.

Q. He would appear there to be referring to the video filming, right?

David Merriman

A. Well, not all of them, but some of them would. And I don't believe there ever would have been a magazine that did not feature ACN that included the Trumps.

Q. I see. If the Trumps were in, it was because of ACN?

A. Correct. Correct.

Q. But perhaps there were features about ACN that didn't reference the Trumps in that period?

A. That is possible, yes.

Q. Okay. Are you aware of any that didn't?

A. I'm not, but --

(Reporter Clarification.)

A. I did not go through them. I did not review all of those as -- either.

Q. Did you review any Success from Home features from that time period?

A. Yes.

Q. And the ones that you reviewed all featured Mr. Trump?

A. Yes.

Q. Is that true of the opportunity discs as well, all the versions of the opportunity disc from 2006, up until it was rolled into the website, which I

David Merriman

think we established was after mid-2014, all of those also featured Mr. Trump?

A. All of the versions that I reviewed from the first one that included Mr. Trump until, I believe, the last one or 2015, whatever time frame that was, included -- featured President Trump as well.

Q. And in the context of Success from Home, you know, was there sort of a similar process, as with the live events where ACN would draft and create -- create the material and then send it to The Trump Organization for collaboration, review and approval?

A. I don't recall whether that was done by ACN to The Trump Organization or if Success from Home and their writers reached out directly to The Trump Organization.

Q. Okay. Well, let's look through a few documents about this.

(Plaintiff Exhibit 28 was marked for identification.)

BY MR. QUINN:

Q. Okay. So this is an e-mail exchange from October 2006 between Allan Van Buhler at ACN and Rhona Graff at The Trump Organization, right?

David Merriman

A. I think it was.

Q. Okay. And were recordings of Mr. Trump's live appearances that are also woven into the opportunity disc or other promotional materials?

A. I don't remember if there were or if there weren't, so I just don't remember, you know, to what degree we used those and if they were allowed to be used.

Q. Okay.

(Reporter clarification.)

A. Allowed to be used. To the extent we were allowed to use them.

Q. All right. So just putting those two things together then, so perhaps some of these shorter clips might have been woven into the opportunity disc, and likewise, for clips of event appearance? But the, kind of, heart of the Trump portions of the opportunity disc was from the 2006 filming?

A. Based on the information we reviewed, that makes sense to me.

Q. Okay. And that was true from 2006 through 2015, or at least up until whatever time in 2014 or 2015 the opportunity disc was no longer used?

A. Yes. I don't recall exactly, you know,

David Merriman

agreement.

(Plaintiff Exhibit 32 was marked for identification.)

BY MR. QUINN:

Q. Okay. Exhibit 32 is a document produced by The Trump Organization with a Bates TTO-000597, and again, this appears to be a hard copy file with some writing on it, but the document itself is a final executed agreement dated January 28th, 2009; is that right?

A. Yes.

Q. And you can see in that first paragraph, it references the prior agreements dated February 6th, 2006 and February 8th, 2008, right?

A. Yes.

Q. Those are the ones that we looked at earlier today?

A. Yes.

Q. All right. And you can see, you know, here again, in the first paragraph, there's discussion of appearances at live events, right, this time four distinct ACN events?

A. Yes.

Q. This time they are actually called national

David Merriman

events, right, so even clearer, these are taking place in the U.S.?

A. I believe all of them did, yes.

Q. Okay. And again, this contract doesn't speak to any separate filming or video content other than the live appearances, right?

A. It does not.

Q. It does in paragraph 1, though, say ACN can record the live appearances?

A. That's correct.

Q. With certain limitations on how those can be used, right?

A. Yes.

Q. This also doesn't include any reference still to Success from Home magazine, right?

A. That is correct.

Q. And yet, members of -- Mr. Trump and members of his family or organization did continue to appear in Success from Home magazine features that featured ACN, right?

A. I'm not sure about this time period, but it's possible.

Q. Okay. Well, let's put that to the side then, and mark the next document.

David Merriman

that SUCCESS, paren, (and he is the publisher), close paren, are an unfair, unbalanced and biased publication and, dash, all they want to probe him about are his successes, his victories and all he does to achieve. They have no interest in controversy or, quote, 'the other side of the story,' close quote. Darren said he wants Mr. Trump to feel like he is sitting down with a friend who wants to make him and ACN look good, not an adversary. Darren has a very close relationship with ACN as well, so there would be no surprises," right?

A. That's what it says, yes.

Q. Do you have any reason or basis to dispute that characterization of Darren Hardy and Success that Ms. Marcello wrote?

A. No, I don't. I don't -- I don't have any opinion either way on this paragraph.

Q. Okay. You can put that to the side.

(Plaintiff Exhibit 36 was marked for identification.)

BY MR. QUINN:

Q. All right. Let's look at the next agreement.

All right. Exhibit 36 is a document

David Merriman

produced to us by The Trump Organization, with the Bates TTO-000615, and this is a January 14th, 2011, appearance and endorsement agreement, right?

A. Yes.

Q. And this, too, is a final binding agreement executed by both Mr. Stevanovski and Donald Trump, right?

A. Yes.

Q. And you can see, again, in the first paragraph, there is -- there are terms about appearance at 4 ACN Events, right?

A. Yes.

Q. But otherwise, there is no -- no term or discussion about some separate video filming, nor is there any reference to Success from Home, right?

A. Correct.

Q. Okay. So let's shift gears a little bit. I want to talk about the ACN appearances on the Celebrity Apprentice.

As I think we mentioned this morning, ACN was featured on two episodes of the Celebrity Apprentice, right?

A. Yes.

Q. They aired in March of 2009 and March of

David Merriman

cofounders who participated and appeared, and then the producers had ultimate editorial control over, you know, scripts and content as well as the final editing?

A. Yes.

Q. And did ACN, similar to the first episode, make efforts to promote the episode with its IBOs and make reference to the appearance in various ACN-created promotional materials?

A. Yes.

Q. All right. Following the 2011 episode, Mr. Trump and ACN continued working together under the 2011 endorsement agreement we looked at earlier?

A. Yes.

Q. And then in 2013, in early 2013, they entered into another agreement to -- as you read -- clarified, not extends, but continue their contractual relationship?

A. Correct.

Q. Let's take a look at that.

(Plaintiff Exhibit 52 was marked for identification.).

BY MR. QUINN:

Q. This agreement was actually produced to us

David Merriman

as an attachment to an e-mail rather than as either a standalone or part of a memo. But if you turn to the Bates number page with the Bates number TTO 000478 in Exhibit 52. You can see at that page, there begins a longer formed document which is referred to in the first line as an "Appearance Agreement."

Do you see that?

A. Yes.

Q. And it says, "The appearance agreement is entered into, as of February 13th, 2013"?

A. Yes.

Q. And if you flip to the Bates -- the page with the Bates number ending in 486, you can see that it's a final executed agreement signed by both Robert Stevanovski and Donald Trump, right?

A. Yes.

Q. Now, as we put it out a moment ago, this one's entitled appearance agreement rather than endorsement agreement or appearance and endorsement agreement. Do you know why that is?

A. No, I think this is primarily focussed on his appearing at ACN events.

Q. Well, that was true also of the January '09 agreement and the 2011 agreement, right, in the sense

David Merriman

that they were just for event appearances and not the kinds of video filming that we saw in earlier agreements, right?

A. Yes. So I -- yes. There is an agreement, right? The title wasn't as important to us as the content.

Q. Let me try to ask it this way. Are you aware of discussion with The Trump Organization, specifically focussed on no longer using the term endorsement to describe the nature of that relationship?

A. I am not, no.

Q. And what we've seen now, which by this point ACN had used the word "endorsed," you know, endorsed by Donald Trump in any number of promotional materials and, you know, including magazines and discs and that sort of thing, right?

A. Yes.

Q. Okay. Now, in paragraph 1, you can see the agreement is also much longer, right? Most of the others have been a page or page and a half. This is quite a few pages.

A. Yes.

Q. And in paragraph 1, there is also, you

David Merriman

know, again, explicit language -- let me just find that. Yes, starting about four lines down where there are -- there is a discussion of the events that Mr. Trump has agreed to appear at. And it says, "Each event should promote ACN's network business to ACN's sales force and shall promote nothing else."

Do you see that?

A. Where are you looking?

Q. Starting about four lines down in paragraph 1 on the first page.

A. Oh, okay.

Q. So that text appears there, right? "Each event shall promote ACN's network marketing business to ACN's sales force and shall promote nothing else," right?

A. Yes.

Q. It also comits to 10 events, right, as opposed to in some of the others we saw three or four, right?

A. Yes.

Q. And then again, in paragraph 3, you know, just at a high level, it, again, acknowledges that ACN is going to record these events, and that it may make use of some of that footage for certain purposes?

David Merriman

A. Yes.

Q. And goes on to say, as we've also seen in some of the prior agreements, that Mr. Trump will make himself available to film short little video clips for use at events or for what's called pick up here, right?

A. Yes.

Q. And that's different than the 2006 video filming, that was a much longer form of filming that was then used in the opportunity disc, right?

A. I'm not sure that -- I don't see those. I don't see any limitation in terms of -- it says, "No such taping shall take more than one hour." I might be missing it, but I don't see anything that says how long each video could be.

Q. Like on the fourth line on the second page, there is a reference that shall not exceed 10 minutes?

A. 10 minutes, right.

Q. Okay. So these are those shorter clips, not the bigger --

A. The shorter clips we are looking at would have been more like 30 second clips, so, you know, 10 minutes is obviously much longer than that.

Q. Uh-huh (affirmative).

David Merriman

MR. QUINN: Do we need to go off the record?

THE VIDEOGRAPHER: No.

BY MR. QUINN:

Q. I want to confirm we are still recording the Zoom, correct? Okay.

Well, in all events, at this time, ACN still had the video recordings from the 2006 agreement, the 2008, the other agreements, right?

A. Yes.

Q. Okay. And there is also a new component here that we see for the first time in this agreement in paragraph 4, which refers to, among other things, a weekly inspirational note, as well as, finally now in black and white, appearances in SUCCESS magazine or Success from Home, right?

A. Yes.

Q. And again, just so the record is clear, this is the first time that a reference to a success publication has been included in -- in an agreement between Mr. Trump and ACN, right?

A. Yes.

Q. But Mr. Trump and his adult children and members of the organization had been featured in